INSPECTOR-GENERAL OF POLICE

v.

TAN SRI RAJA KHALID RAJA HARUN

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 36 OF 1987]
17 NOVEMBER 1987

ADMINISTRATIVE LAW: *Habeas corpus - Writ of habeas corpus - Prerogative process for securing liberty of subject - Unlawful or unjustifiable detention.*

ADMINISTRATIVE LAW: *Detention - Whether any evidence respondent acted in manner prejudicial to security of country - Scope of s. 73 Internal Security Act 1960.*

This was an appeal by the IGP against the decision of the High Court, which ordered the release of the respondent forthwith on 11 February 1987 pursuant to the writ of *habeas corpus* filed by the respondent.

Held:

[1] Where a person who has been deprived of his liberty challenges the detention it is for the authority to show that the person has been detained in exercise of a valid legal power. Once that is shown it is for the detainee to show that the power had been exercised *mala fide* or improperly or made for a "collateral" or "ulterior" purpose. Section 73(7) of the Internal Security Act 1960 ("the Act") states that a person detained pursuant to the powers conferred shall be deemed to be in lawful custody. Thus the burden is immediately shifted to the detainee.

[2] Since s. 73(1) and s. 8 of the Act are so inextricably connected the subjective test should be applied to both. The Court cannot require the police officer to prove to the Court the sufficiency of the reason for his belief under s. 73(1) of the Act. The learned Judge was in error when he said in his judgment to the effect that if there is evidence that the applicant has acted in a manner prejudicial to the security of the country, such evidence "must be disclosed to the Court albeit confidentially even on a need-to-know basis, to enable the Court to be satisfied that the arrest and detention of the applicant under s. 73 (of the Act) is justified in the circumstances."

[3] The learned Judge was also in error to ignore the express provision of Clause 3 of Article 151 of the Federal Constitution for by that clause the authority cannot be required to furnish facts whose disclosure would in its opinion be against national interest. However, if facts are furnished voluntarily, exhaustively and in great detail as in this case for consideration of the Court it would be naive to preclude the Judge from making his own evaluation and assessment to come to a reasonable conclusion.

[4] In this case the learned Judge thought it to be incredible that losses sustained by a public bank where the depositors also include members of the public at large could result in any organised violence by the soldiers. In fact the person who alleged that was not even an army officer although sub-section (6) of s. 73 also empowers any member of the security force to act under that section. It is difficult to disagree with the learned Judge on his conclusion.

[Appeal dismissed with costs.]

Cases referred to:

Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129
Re Ong Yew Teck [1960] 26 MLJ 67
Liversidge v. Anderson [1942] AC 206
Reg v. IRC Ex p. Rossminster [1980] AC 952
Merdeka University Bhd. v. Government of Malaysia [1982] 2 MLJ 243
CCSU v. Minister for Civil Service [1985] 1 AC 374
John Peter Berthelsen v. Director-General of Immigration, Malaysia & 2 Ors. [1986] CLJ (Rep) 160

Legislation referred:

Criminal Law (Temporary Provisions) Ordinance 1955 [Sing], ss. 47, 55, (1)
Federal Constitution, arts. 5, 9, 10, 149, 151, (3)
Internal Security Act, ss. 8, (1), 73, (1), (7)

For the appellant - Y.B. Tan Sri Abu Talib bin Othman; (T. Selventhiranathan, SFC, with him) Attorney- General
For the respondent - G. Sri Ram (S.C. Loh with him); M/s. Sri Ram, Zulkifly & Kumar

[Editors Note: The Judgment of the High Court, leading to this Appeal, is reported at [1987] CLJ (Rep) 1014.

JUDGMENT

Salleh Abas LP:

On 13 January 1987 the respondent was arrested by a police officer (Deputy Superintendent of Police, Basri bin Ismail) attached to the Special Branch, Police Headquarters, Bukit Aman, Kuala Lumpur. The officer deposed that he arrested and detained the respondent pursuant to s. 73(1) of the Internal Security Act 1960 ("the Act"). At the time of the arrest the officer explained to the respondent that he (the police officer) had reason to believe that there are grounds which would justify the respondent's detention under s. 8 of the Act and that he had acted in a manner prejudicial to the security of the country.

On 27 January 1987 the respondent by originating motion of the same date instituted *habeas corpus* proceeding in the High Court Kuala Lumpur. On 11 February 1987 Harun J ordered the release of the respondent.

To get our perspective right it may be useful to recapitulate at the outset that the writ of *habeas corpus ad subjiciendum*, commonly known as the writ of *habeas corpus*, is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release for **unlawful** or **unjustifiable** detention whether in prison or in private custody. The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in *habeas corpus*. In any matter involving the liberty of the subject the action of the Crown or its ministers or officials is subject to the supervision and control of the Judges on *habeas corpus*. The right to the writ is a right which exists at common law independently of any statute, though the right has been confirmed and regulated by statute.

The Act was enacted under Article 149 of the Federal Constitution. It is a legislation essentially to prevent and combat subversions and actions prejudicial to public order and

national security. It is expressly provided in the Constitution that such a law as the Act is valid notwithstanding that it is inconsistent with Articles 5, 9 or 10 of the Constitution dealing with fundamental liberties. Article 151 of the Constitution provides for the procedure relating to preventive detention under any law or Ordinance enacted under that Part of the Constitution. Clause (3) of Article 151 expressly provides that:

> This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

The facts furnished to the learned Judge in the affidavit of Deputy Superintendent Basri bin Ismail may be summarised as follows. At all material times the respondent was Managing director of Malayan Commercial Services Sdn. Bhd., a company dealing in consultancy services. During the period October 1975 to August 1985 the respondent was also a director of the Perwira Habib Bank and a member of its loans committee. It was alleged that the respondent provided consultancy services through the said company which resulted in massive loans by the Bank to various parties thereby causing substantial losses to the Bank. A police investigation of the alleged criminal breach of trust of monies during the respondent's tenure as director of the Bank was undertaken during the first week of January 1987 and the respondent was interviewed for three days by the police in that connection.

According to Deputy Superintendent Basri bin Ismail he had reason to believe that the substantial losses suffered by the Bank were caused particularly through the acts of the applicant which evoked feelings of anger, agitation, dissatisfaction and resentment amongst members of the armed forces. The basis for the belief would appear to be as stated in para. 5 of his affidavit which read as follows:

> 5. The Lembaga Tabung Angkatan Tentera holds 46.48 per cent of the shares of the bank. All servicemen in the armed forces who do not qualify for pension are required by law to contribute to the Tabung Angkatan Tentera. In addition, a large number of members of the armed forces are account holders of the bank.

After considering the lengthy affidavit of the police officer the Judge held that there was no evidence disclosed that the respondent has acted in any manner which is prejudicial to the security of the country and accordingly ordered the release of the respondent forthwith.

Section 73 of the Act reads as follows:

> 73. (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe:
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> (a) that there are grounds which would justify his detention under s. 8; and
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> (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
>
> (2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.
>
> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under s. 8:
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> Provided that:
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a

police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

(4) - (5) (Repealed).

(6) The powers conferred upon a police officer by sub-sections (1) and (2) may be exercised by any member of the security forces, any person performing the duties of guard or watchman in a protected place and by any other person generally authorized in that behalf by a Chief Police Officer.

(7) Any person detained under the powers conferred by this section shall be deemed to be in lawful **custody**, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister.

Section 8(1) of the Act reads as follows:

If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.

The arrest and detention under s. 73(1) is pending enquiries to see if an order under s. 8 should be made by the Minister. It is clear from the language of the two sections that s. 73 provides for the initial detention and cannot be divorced from s. 8 of the Act which provides for the final detention.

Where a person who has been deprived of his liberty challenges the detention it is for the authority to show that the person has been detained in exercise of a valid legal power. Once that is shown it is for the detainee to show that the power had been exercised *mala fide* or improperly or made for a "collateral" or "ulterior" purpose. Section 73(7) states that a person detained pursuant to the powers conferred **shall be deemed to be in lawful custody**. Thus the burden is immediately shifted to the detainee.

Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 laid down the law on s. 8 of the Act. Whether or not the facts on which the order of detention is to be based are sufficient or relevant is a matter to be decided solely by the executive.

There are no decided cases on s. 73 of the Act but the rationale in the Singapore case of *Re Ong Yew Teck* [1960] 26 MLJ 67 can by analogy be applied. There the *habeas corpus* proceeding was in respect of an applicant arrested and detained under s. 55 of the Criminal Law (Temporary Provisions) Ordinance 1955. The language of s. 55(1) of the Singapore Ordinance is very similar to that of s. 73(1) of our Act and likewise in the case of s. 47 of the Ordinance and s. 8 of our Act. The applicant there contended that the arrest was illegal on the grounds that when the detective corporal was making the arrest he had no reason to believe that there were grounds to justify detention under s. 47 and that s. 55(1) of the Ordinance imposes an objective test and the Court could examine whether there was in fact sufficient reason to justify the detention. The crucial question raised was whether the language of s. 55(1) of the Ordinance imposed an objective test. It was contended that since the

jurisdiction of the police officer depends on whether he has reason to believe that there are grounds which would justify the detention of the applicant under s. 47 of the Ordinance, then the existence of such reason is a condition precedent to the police officer's jurisdiction and that the facts constituting the reason are for the Courts to find and appraise and not for the police officer. The only distinction between that case and the present case is that in the former case the detective corporal who effected the arrest was only the instrument of his superior officer, DSP Ong Kian Ting. On this Chua J said at p. 68:

> I now come to the crucial point. Who is to decide the issue of "reason to believe"? DSP Ong Kian Ting himself or a Court? If it is for the Court to decide then the Court must have all the material evidence before it otherwise it would be futile to ask the Court to decide.

The Judge then concluded that s. 55(1) of the Ordinance imposed a subjective test.

Mr. Sri Ram for the respondent has urged us to dislodge *Karam Singh*. What in effect he was saying is that the ghost of *Liversidge v. Anderson* [1942] AC 206 should not cast any shadow on the Act and it should no longer be allowed to haunt the law. See also the speech of Lord Scarman (at p. 1025) in *R. v. IRC Ex p. Rossminster* [1980] AC 952, 1011, 1025 where the majority opinion in *Liversidge v. Anderson* came under heavy attack.

But we would prefer to adopt a realistic rather than a pedantic approach on a matter such as this. We regard the preference for the objective approach to the subjective formula approved in *Merdeka University Bhd. v. Government of Malaysia* [1982] 2 MLJ 243 as only a general proposition to be applied in normal judicial review cases.

Liversidge was detained under the infamous reg. 18B. Those detained under that regulation were not proved to be enemies of the state nor have they done anything actively hostile to the state. They were detained simply on suspicion that they might do something harmful to the security of the state. Liversidge asked for particulars of the grounds on which the Home Secretary had "reasonable cause to believe". All the Judges (save Lord Atkin) held that Liversidge was not entitled to the particulars. Lord Denning never known for being conservative in his approach to the law noted his disapproval of the classic dissent of Lord Atkin in his *Landmarks In The Law* (Butterworth 1984):

> The sentiments find an echo in the hearts of every Englishman. But this should not blind us to the fact that Lord Atkin's dissent was wrong. He was construing the words of reg. 18B in their objective sense: whereas they should have been construed - and were construed by all the others - against the background of the danger we were in and the necessity of combating the enemies in our midst.

In *CCSU v. Minister for Civil Service* [1985] 1 AC 374 the staff of the security Headquarters (GCHQ) at Cheltenham had been members of civil service unions for many years. But those unions on several occasions took disruptive action which adversely affected the sensitive areas of the United Kingdom intelligence network. It was so serious that the ministers of the crown decided that the unions should be banned from Cheltenham. The ban was put into effect by the Prime Minister who was the minister responsible for national security. Her action was contrary to the European Convention on the right of every person to form and join a trade union and it was also contrary to natural justice because she did not consult the trade unions or hear their case. When the appeal came before the House of Lords the appeal was dismissed. In the speech of Lord Diplock (at p. 407) it was made clear that the law relating to judicial review has reached the stage where it can be said with confidence that if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say

if it is a matter upon which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. The caveat is **if the subject matter is justiciable**. Thus Lord Diplock said at p. 412:

> The reason why the Minister for the Civil Service decided on 22 December 1983 to withdraw this benefit was in the interests of national security. National security is the responsibility of the executive government; what action is needed to protect its interests is, as the cases cited by my learned friend, Lord Roskill, establish and common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.

In *CCSU*

> The respondent has established that the work at GCHQ was a matter of grave national security, second, that security would have been seriously compromised had industrial action akin to that previously encountered between 1979 and 1981 taken place, third, that consultation with the appellants prior to the oral instructions would have served only further to reveal the vulnerability of GCHQ to such industrial action, fourth, that it was in the interests of national security that that should not be allowed to take place, and fifth, that accordingly the respondent was justified in the interests of national security in issuing the instructions without prior consultation with the appellants. - per Lord Roskill at p. 423.

As adverted to earlier we must be realistic rather than pedantic. As Ong CJ said in *Karam Singh* the problem requires a "realistic approach rather than as an exercise in semantics". (p. 141)

Here we are dealing with an Act authorised and enacted under the special provisions of the Constitution namely Part XI providing for "special powers against subversion, organised violence, and acts and crimes prejudicial to the public, and emergency powers."

In simple language what s. 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the officer has reason to believe there are grounds to justify the person's detention under s. 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code defines "reason to believe" to mean "sufficient cause to believe". Who then is to decide what is sufficient cause under s. 73(1) of the Act? That is the crux of the matter.

We hold that since s. 73(1) and s. 8 of the Act are so inextricably connected the subjective test should be applied to both. The Court cannot require the police officer to prove to the Court the sufficiency of the reason for his belief under s. 73(1). It follows that the learned Judge was in error when he said in his judgment (p. 5) to the effect that if there is evidence that the applicant has acted in a manner prejudicial to the security of the country such evidence "must be disclosed to the Court albeit confidentially even on a need-to-know basis, to enable the Court to be satisfied that the arrest and detention of the applicant under s. 73 is justified in the circumstances." He made this unfortunate statement purporting to rely on *John Peter Berthelsen v. Director-General of Immigration, Malaysia & 2 Ors.* [1986] CLJ (Rep) 160 the passage at p. 163. In our view the passage should be read in the context of the paragraph in which it appears. *Berthelsen* was an Immigration case. It dealt with the need to give a right to make a representation to an aggrieved person (in this case a foreign journalist) before his legitimate expectation (i.e. his employment pass) was to be withdrawn from him by the Immigration Authority. Such right of being heard must be given to him even

though the grounds upon which the authority proposed to act were based on security considerations. In such case, whilst the authority was required to hear the representation from the aggrieved person, in no sense would it be bound to disclose any grounds or information which in its opinion would constitute security. This is entirely a matter for the authority concerned. *Berthelsen* is not an authority to say that the test of what constitute security is an objective test; the case being entirely on a different fact-situation.

The learned Judge was also in error to ignore the express provision of Clause (3) of Article 151 of the Constitution for by that clause the authority cannot be required to furnish facts whose disclosure would in its opinion be against national interest. But if facts are furnished voluntarily exhaustively and in great detail as in this case for consideration of the Court it would be naive to preclude the Judge from making his own evaluation and assessment to come to a reasonable conclusion. In this case the learned Judge thought it to be incredible that losses sustained by a public bank where the depositors also include members of the public at large could result in any organized violence by the soldiers. In fact the person who alleged that was not even an army officer although sub-section (6) of s. 73 also empowers any member of the security force to act under that section. We found it difficult to disagree with the learned Judge on his conclusion.

Appeal dismissed with costs.

Also found at [1988] 1 CLJ 39